IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 41

A. L. MECHLING BARGE LINES, INC., MISSISSIPPI VALLEY BARGE LINE COMPANY, THE OHIO RIVER COMPANY, AND BLASKE, INC.,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees,

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,

Intervening Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION.

MOTION TO AFFIRM.

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CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 667.

A. L. MECHLING BARGE LINES, INC., MISSISSIPPI VALLEY BARGE LINE COMPANY, THE OHIO RIVER COMPANY, AND BLASKE, INC.,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees,

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION.

MOTION TO AFFIRM.

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellees, The Pennsylvania Railroad Company, and other intervening railroad defendants—appellees, as shown in Appendix A hereto attached, in the District Court move that the judgment of that Court be affirmed on the ground that the matters involved are moot and do not present a substantial question for review.

This proceeding involves a direct appeal from the judgment of the three-judge United States District Court for the Eastern District of Missouri, Eastern Division, entered September 16, 1960. That Court granted defendants' and intervening defendants' Motions to Dismiss on the grounds of mootness, dismissed plaintiffs' complaint and denied the relief therein sought.

STATEMENT OF THE CASE.

Appellants before the three-judge court sought (1) to enjoin, set aside, annul and suspend the fourth section order of the Commission, and (2) to enter a declaratory judgment upon certain questions of law. The Fourth Section Order No. 19059, as supplemented, granted the applicant railroads temporary authority to maintain lower rates from certain Illinois and Wisconsin origins to the East than the rates maintained from intermediate origins to the same destinations. On March 28, 1960, applicant railroads advised the Commission and all interested parties that applicants had published effective March 10, 1960, reduced rates from the intermediate origins which made unnecessary the relief granted by Fourth Section Order No. 19059, as supplemented. By notice dated March 31, 1960, the Commission advised that the applications were considered withdrawn. There are therefore no longer outstanding fourth-section departures and the temporary fourth section authority and Fourth Section Order No. 19059, as supplemented, are no longer effective. As pointed out in *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 567 (1918), where carriers' rates do not conform with Section 4 of the Act, they may, at their option, "keep in effect the low rate from the more distant point by lowering the rates to intermediate points." This the railroads have done. The result of their action is to terminate all controversy between the parties relating to Section 4 of the Inter-

state Commerce Act, 49 U. S. C. § 4. Motions to Dismiss were filed by defendants and intervening defendants, appellees, on the grounds of mootness and that declaratory judgment relief would not lie. The three-judge district court unanimously sustained defendants' and intervenors' Motions to Dismiss. The court concluded that the cause of any controversy that existed has been terminated by the publishing of rates that fully conformed in all respects to the requirements of Section 4 of the Interstate Commerce Act, 49 U. S. C. § 4.

STATEMENT IN SUPPORT OF MOTION TO AFFIRM

The order which plaintiffs seek to enjoin has ceased to be effective and the relief thereunder cannot be reinstated. *Vicksburg, Shreveport & Pacific Railway* v. *Anderson-Tully Co.*, 256 U. S. 408, 416 (1920); *Lime From C. F. A. Territory & Southwest to Boutte, La.*, 294 I. C. C. 616, 618 (1955); *Maggioni & Co.* v. *Atlantic Coast Line Railroad*, 272 I. C. C. 127, 131 (1948). The issue of an injunction has been thereby rendered moot. *Dixie Carriers, Inc.* v. *United States*, 355 U. S. 179 (1957); *Arkansas & Louisiana Missouri Railway Co.* v. *Amarillo-Borger Express, Inc.*, 352 U. S. 1028 (1957); *Coastwise Lines* v. *United States*, 157 F. Supp 305, 306 (1957). As pointed out by the three-judge court, plaintiffs recognized, in paragraph 19 of the complaint, that cessation of the temporary relief would render the injunction moot.

The questions which appellants seek to make the subject of a declaratory judgment do not involve an actual controversy. Regardless of whether an "actual controversy" had existed with respect to the particular commission action here under review, clearly such controversy terminated upon the withdrawal of the applications and discontinuance of the temporary authority. However convenient appellants might deem it for them, the court is not empowered to de-

cide moot questions or abstract propositions for the government of future cases which cannot affect the result as to the matter in issue in the case before it. *Local No. 8-6, Oil, Chemical & Atomic Wkrs.* v. *Missouri*, 361 U. S. 363, 367 (1960); *Utah* v. *Wycoff Co.*, 344 U. S. 237, 243-245 (1952); *Amalgamated Association* v. *Wisconsin Emp. Rel. Bd.*, 340 U. S. 416, 418 (1951); *United States* v. *Alaska Steamship Co.*, 253 U. S. 113, 116 (1919); *Mills* v. *Green*, 159 U. S. 651, 653 (1895); *California* v. *San Pablo & T. R. Co.*, 149 U. S. 308, 314 (1892).

In *Electric Bond & S. Co.* v. *Securities & Exchange Comm.*, 303 U. S. 419, 443 (1937), the Court declined speculative inquiry into a variety of hypothetical controversies which may never become real stating that "Defendants are not entitled to invoke the Federal Declaratory Judgment Act in order to obtain an advisory decree upon a hypothetical state of facts." *International L. & W. Union* v. *Boyd*, 347 U. S. 222, 223-224 (1953); *Barker Painting Co.* v. *Brotherhood of Painters, Decorators and Paperhangers*, 281 U. S. 462, 463-464 (1929).

Appellants suggest that three of the decisions relied on by the court below were not relevant since, they contend, the cases "involved no question of a recurring pattern of behavior." *Mills* v. *Green*, 159 U. S. 651 (1895), clearly supports the proposition for which it was cited, *i.e.*, it is the duty of the Court "to decide actual controversies * * *, and not to give opinions upon moot questions or abstract propositions, or to decide principles or rules of law which cannot affect the matter in issue in the case before it." In *Amalgamated Association of Street Etc. Employees* v. *Wisconsin Employment Relations Board*, 340 U. S. 416 (1951), it was urged that the questions should be decided even though moot because of their importance but the Court

reaffirmed its position that "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." The "so-called" companion case, *Amalgamated Association of Street Etc. Employees* v. *Wisconsin Employment Relations Board*, 340 U. S. 383 (1951), involved a "perpetual" injunction which clearly had a continuing affect on the rights of the parties involved. In *Local No. 8-6, Oil, etc. Union* v. *Missouri*, 361 U. S. 363 (1960), as in *Harris* v. *Battle*, 348 U. S. 803 (1954), cited as controlling in that case, the "recurring" nature is similar to that alleged by plaintiff in the immediate case. In the *Harris* case, *supra*, the alleged "continuing threat of state seizure in future disputes" may be likened to the alleged issuance of "fourth section orders" by the Commission pursuant to future applications.

In support of their contention that the issues in this proceeding have not become moot, appellants rely in their Jurisdictional Statement on decisions which do not support their position. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498 (1911), and *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433 (1911) involve maximum rate orders of that Commission. By statute, at that time, orders of the Commission were limited to a two year duration. It was the practice of the Commission, when necessary, to reinstate the order after the two years. The Court pointed out that consideration of such an issue ought not to be, as they might be, defeated by short term orders, capable of repetition. In those cases, the very subject matter, *i. e.*, the same involved rate, was capable of being the subject of recurring orders. This is the case in all the proceedings cited by appellant. For example, in *McGrain* v. *Daugherty*, 273 U. S. 135 (1927), the subject matter of the proceeding, *i. e.*, the activities of a select committee of the Senate, were merely sus-

pended pending a decision in that case. The Court observed that the committee may be revived or continued by motion to that effect; that this being so, and the Senate being a continuing body, the case could not become moot in the ordinary sense.

Likewise, in *Dyer* v. *Securities & Exchange Commission*, 266 F. 2d 33, 41, 46 (8th Cir., 1959), cert. den., 361 U. S. 835 (1960), the Rules of the Securities & Exchange Commission provided that stockholder proposals, if they receive less than 3% of the votes cast, may be omitted from the proxy material for three calendar years. Thus the Commission's allowance of the voting of the involved proxies would have a continuing effect beyond the particular year cast.

If in another proceeding involving other carriers, other commodities, other rates and other orders, appellants feel that their rights have been violated and an order of the Commission is invalid, they have available to them at that time the statutory right to seek injunctive relief which, if granted, would prevent the operation of the Commission order as provided in Section 10 of the Administrative Procedure Act, 5 U. S. C. § 1009(d) and 28 U. S. C. § 2321 set forth in Appendix G, Jurisdictional Statement. Plaintiffs-appellants have indeed utilized this procedure in other cases. See *Corn and Corn Products, Illinois to Official Territory*, 310 I. C. C. 437, 438 (1960).

CONCLUSION.

Wherefore, the intervening defendants-appellees respectfully submit that the matters in this cause have been rendered moot, no actual controversy exists upon which a declaratory judgment may be entertained and do not present a substantial question for review and the decree of three-judge district court should be affirmed.

Respectfully submitted,

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February, 1961.

PROOF OF SERVICE.

I, James E. Steffarud, one of the attorneys for the appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 17th day of February, 1961, I served copies of the foregoing Motion to Affirm on the several parties to the case as follows:

(1) On the United States of America by mailing copies in duly addressed envelopes with air mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C., to Robert A. Bicks, Assistant Attorney General; John H. D. Wigger, Attorney, same address, and William H. Webster, United States Attorney, St. Louis 1, Missouri.

(2) On the Interstate Commerce Commission by mailing copies in duly addressed envelopes with air mail postage prepaid to Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., and to H. Neil Garson, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

(3) On the plaintiffs-appellants by mailing copies in duly addressed enevelopes with first class postage prepaid to their attorneys of record, Wilbur S. Legg and Edward B. Hayes, 135 South La Salle St., Chicago 3, Illinois.

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JAMES E. STEFFARUD.

APPENDIX A.

The Railroad Intervening Defendants-Appellees are as follows:

The Atchison, Topeka and Santa Fe Railway Company.
The Baltimore and Ohio Railroad Company.
The Chesapeake and Ohio Railroad Company.
Chicago and North Western Railway Company.
Chicago, Great Western Railway.
Chicago, Burlington & Quincy Railroad Company.
Chicago, Milwaukee, St. Paul and Pacific Railroad.
Chicago, Rock Island and Pacific Railroad Company.
Erie Railroad Company.
Grand Trunk Railway System.
Gulf, Mobile and Ohio Railroad.
Illinois Central Railroad.
Minneapolis, St. Paul and Sault Ste. Marie Railroad Company.
The New York Central Railroad Company.
The New York, Chicago and St. Louis Railroad Company.
The Pennsylvania Railroad Company.
Wabash Railroad Company.